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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 110

NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 111

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

National Woodwork Manufacturers Association, et al., Petitioners in No. 110 and Respondents in No. 111, pray that this Court grant rehearing of its decision and order of April 17, 1967, and that the judgment of the Court below in No. 110 be reversed and the judgment in No. 111 affirmed.

REASONS FOR GRANTING REHEARING.

The *ratio decidendi* of the Court's decision is that a union objective of work preservation is the touchstone of product boycott immunity under the Act. We respectfully submit that this conclusion is based on a misconception of Congress' intention as revealed by the statutory language, the legislative history, and the cases applying the Act.

1. The Statute and "Work Preservation."

There is substantial agreement on all sides that the language of Sections 8(b)(4)(B) and 8(e) expressly proscribes the boycott agreement of Rule 17 and the Union action taken to maintain and enforce that agreement. There is nothing whatever in the statute about work-preservation immunity.

It is fundamental that a statute must be applied according to its plain language in the absence of clear and compelling indicia of congressional intent to the contrary. We find nothing in the majority opinion of the Court pointing to clear-cut or persuasive evidence of congressional intent that there should be carved out of the express proscriptions of the Act an exemption for "work preservation" product boycotts. On the contrary, we believe that the legislative history evidences a congressional intention that there should be no such exemption. But assuming *arguendo* that the history is obscure on the precise point in issue, we respectfully submit that the absence of specific and compelling guidance in the legislative history should lead the Court *back to*, and *not away from*, the plain language of the statute.

2. The Legislative History and "Work Preservation."

The core of this case goes back to what Congress intended when it enacted Section 8(b)(4)(A) in 1947. This follows from the fact that there is agreement on all sides that the basic objective of this section was not changed when it was re-enacted as Section 8(b)(4)(B) in 1959, and that Section 8(e) is to be taken *pari passu*.

All agree also that the inadequacy of the antitrust laws to prevent the type of product boycotts in *Allen Bradley*[1] was a dominant reason for the enactment of Section 8(b)(4)(A).

It is of crucial importance, therefore, that the product boycotts in *Allen Bradley* were in fact essentially pure product boycotts—i.e., boycotts of prefabricated and other electrical products where the boycotting union's prime objective was the provision of work for its members without regard to the union status, the working conditions, or even the identity of the particular manufacturers who made the blacklisted products; in other words, product boycotts as such. It is true that an incident of the conspiracy was that jobsite workers *accepted* some products made by local manufacturers, but this conduct did not involve boycotts at all. The product boycotts in the case which incited congressional condemnation were those which had the clear purpose of *providing local work for members of the boycotting union* (exactly as in the instant case) without any regard for the union status or working conditions of the manufacturers of the boycotted products. They were "work preservation" and "make work" boycotts. Also, as in the present case, the union in *Allen Bradley* even boycotted products made by its sister locals. Therefore, we submit that the Court's reliance on *Allen Bradley* to support its "work preservation" exemption theory is misplaced.

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1. *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U. S. 797 (1945).

To correct any misunderstanding that the boycotting union's objective in *Allen Bradley* was to provide work for jobsite workers and, in many situations, to ban prefabricated products, we refer briefly to certain findings which must not have come to the Court's attention.

325 U. S. 797, 798 (1945):

This Court described the boycotting union's motive as follows:

> "The question presented is whether it is a violation of the Sherman Anti-trust Act for labor unions and their members, *prompted by a desire to get and hold jobs for themselves* at good wages and under high working standards, to combine with employers and with manufacturers of goods to restrain competition in, and to monopolize the marketing of, such goods."

145 F. 2d 215, 220 (2d Cir. 1944):

The Court of Appeals described the Union's boycotts as "a make-work campaign for the benefit of union members."

41 F. Supp. 727 (S. D. N. Y. 1941):

The District Court described the union's boycotts and objectives as follows:

Page 733:

> "The objective of the combination and the conspiracy was not to carry on the unionization, or any change or improvement in working conditions in the factories of the plaintiffs outside of New York State. In the case at bar, business manager Van Arsdale and his associates frankly stated that *they were in no way concerned with the working conditions, the rate of wages or the union affiliations of the plaintiffs' factories. It was immaterial to them whether members of other*

locals of their own union were employed by the plaintiffs."[2] (Emphasis added.)

Page 738:

"The evidence clearly establishes that the insistence by the Union that *completely wired lighting fixtures should not be installed on any building within the jurisdiction of the union* but that all such fixtures should be delivered in New York City '*knocked down*' *and the wiring put in here,* materially increased the cost of such fixtures in New York City buildings and gave work to but a small group of union members, but the question of added costs was one which never concerned the union."[3] (Emphasis added.)

• • • • •

"Electrical control-boards of tremendous size were required to meet all of the varied uses to which electrical power was to be put in the operation of the buildings. *When these boards arrived at the building site, completely fabricated and ready to be connected up by wires from the board to the several distribution points,* the amount of work on these prefabricated boards which, thirty years before, would have been done on the job by the journeymen, moved the union leaders *to demand that such work should thereafter all be done at the job site;* that all installing and wiring, and placing bus-bars and affixing all current-carrying parts *must be done by members of the local union at the local site.*[4]

"It did not concern them that all this work had to be done previously at the factory in order to test the apparatus and demonstrate that it was working properly, and that, after such test, additional unnecessary work at the factory was required to disassemble the

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2. This description does not embody the slightest semblance of "secondary" impact, as the Court uses that term in the instant case.

3. This is the exact counterpart of the Union's boycott of prefabricated doors in the present case.

4. Again, this is the exact counterpart of the pure product boycott in the instant case.

board and ship the current-carrying parts separately. A stand was made and a strike was threatened, unless an agreement should be entered into which would, as the union phrased it, *'preserve the work opportunities of the local union'.*"[5] (Emphasis added.)

Page 746:

"The evidence in the case at bar clearly shows that the defendant union was in no way concerned in improving the working conditions, or with the hours and wages, or with the proper representation of the workers in the factories of the plaintiffs. As already pointed out, they frankly stated that nothing that the plaintiffs could have done would have affected their attitude toward the limitation upon, or the exclusion of, the plaintiffs' goods in the construction industry in New York City."[6]

During the congressional hearings which led to the Taft-Hartley Act, Hoyt P. Steele, representing the National Electrical Manufacturers Association, described the New York Electrical Workers' boycott of prefabricated electrical fixtures as follows:[7]

"Prior to the development of the fluorescent lamp, lighting equipment was generally completely wired on the job at the time of installation. This work, therefore, was done by electrical installation men.

"However, fluorescent lighting fixtures require a considerable amount of auxiliary electrical equipment, such as starter switches and ballasts, which entails additional wiring *which can be done most practicably at the time of manufacture in the factory.*

"Since the advent of the fluorescent lamp for commercial and industrial applications in 1940, we have

5. Exactly as in the present case.

6. Again, a complete absence of any so-called "secondary" objective.

7. Hearings before the Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess., p. 382 (February 12, 1947). (This was the committee which eventually reported out Section 8(b) (4) (A), as enacted.)

periodically been subjected to local boycotts by certain locals of the International Brotherhood of Electrical Workers (AFL), who regarded this factory wiring as an encroachment on their private preserve. . . .'"[8] (Emphasis added.)

The union's objective of providing work for jobsite workers in *Allen Bradley* was well known to Congress. Senator Ellender, a leading proponent of the Act, described the *Allen Bradley* boycott as follows (R. 128):

> "Another example is the New York Electrical Workers Union, the IBEW. That union has become so powerful that it has organized not only those who make the electrical equipment but those who receive it from the factory and install it. As a matter of fact, no employer who manufactures electrical equipment outside of New York has a ghost of a show of having his equipment placed in the large buildings in New York City. When such equipment is sent to New York City, *the IBEW local refuses to install it unless it is permitted to tear all the equipment apart and assemble it again.* Of course, one can readily understand that such procedure is unconscionable and that it results in high costs to those engaged in the erection of office buildings, homes, and stores; in fact, all sorts of buildings requiring electrical equipment." (Emphasis added.) II Leg. Hist. (1947), p. 1056; 93 Cong. Rec. 4132.

Rejecting the mild bill proposed by the Administration and supporting Section 8(b)(4)(A), Senator Ball commented on the *Allen Bradley* situation as follows [II Leg. Hist. (1947), p. 1491; 93 Cong. Rec. 5011]:

> "That would not touch at all one of the worst situations which has arisen, such as that in New York where a local of the IBEW is using the secondary boy-

8. A work-preservation boycott against technologically advanced products.

> cott to maintain a tight little monopoly for its own employeess, its own members, and a few employers in that area. . . .'"[9]

Only by strained reasoning can any so-called "secondary" objectives be distilled out of *Allen Bradley*. In substance and essence, it was a pure product boycott case as such. The Electrical Workers, in their jobsite boycotts of prefabricated and factory-assembled products, had no concern whatever with the working conditions of the manufacturers of such products.

It is clear, too, that Congress was aware of the inimical effect of boycotts against technologically improved products and intended that the statute would ban such boycotts, as such. Congressman Javits' statement of this purpose was a considered reflection of congressional understanding. Contending that the bill should be narrowed, he conceded that Section 8(b)(4)(A) (in the form in which it was later enacted) should and did ban boycotts of technologically improved products [I Leg. Hist. (1947), p. 876; 93 Cong. Rec. 6296]:

> "Under the extremely wide definition of boycotts in the bill, unions cannot protect themselves against strikebreaking within the same industry. . . . *This [union-goods boycott] is not the kind of boycott which is contrary to the public interest, that other kind results from a misguided labor union's efforts to keep certain goods out of a market because the labor union fears the effect of new inventions or new methods. But while dealing with this legitimate abuse, the bill also has the effect of depriving labor of a right of self preservation which has never been questioned before.*" (Emphasis added.)

It is also apparent that Congress was still of the same mind at the time of the 1959 amendments. Congress' un-

9. This is precisely the scope and effect of Union Rule 17 in the instant case—to establish a monopoly of all cutting and fitting of doors throughout the entire Philadelphia construction area.

derstanding that the Act proscribes boycotts against technologically improved products is demonstrated by Representative Thompson's explanation that his "common situs" amendment would not affect the acknowledged unlawfulness of boycotts of prefabricated products under Section 8(b)(4) [II Leg. Hist. (1959), p. 1577; 105 Cong. Rec. 15541]:

> "All true secondary boycotts in the construction industry would continue to be unlawful, such as *the refusal to erect prefabricated houses* or to work on nonunion goods." (Emphasis added.)

Similarly, Representative Rhodes, supporting the 1959 amendments, specifically referred to boycotts of prefabricated products as *one of three types* of boycott *agreements* to be proscribed [II Leg. Hist. (1959), p. 1581; 105 Cong. Rec. 15545]:

> "At the present time not only do most Teamster contracts contain such clauses but various building and printing trade unions have insisted on *contracts under which employees are excused from handling certain prefabricated products,* products which do not bear the label of a particular union, or products manufacutred by a company dealing with some other union. *Were it not for the immunity granted labor organizations from the antitrust laws the courts would undoubtedly have invalidated such contracts as being flagrant restraints of trade.*" (Emphasis added.)

In sum, we submit that, in addition to other forms of boycotts, Congress clearly intended to outlaw boycotts against prefabricated and technologically improved products. Congressional condemnation of such boycotts was not conditioned on, or concerned with, so-called "secondary" factors involving the manufacturers or the absence of a union motivation of work preservation.

The Court can with confidence conclude from the Allen Bradley case and the legislative history that, in addition to "primary-secondary" type boycotts, Congress intended

to ban the type of prefabricated product boycott in this case, and we respectfully suggest that the Court cannot with confidence conclude to the contrary.

3. The Product Boycott Cases and "Work Preservation."

In *all* the work-preservation product boycott cases from 1947 until the recent decisions of the Board, the Board and the courts consistently held that Section 8(b)(4)(A) (now "(B)") means what it says, and that an object of "work preservation" does not justify a product boycott to attain that objective.

From a reading of the majority opinion, it is not clear to what extent these cases were taken into account; only two of them are cited, and none are discussed. Yet these cases are the counterparts of the present case and would seem to be the most relevant and of greatest consequence in considering the application of the statute in the particular type of product boycott involved in those cases and the present case.

These product boycott decisions are of particular significance because they apply the fundamental doctrine of "dual objectives" established by this court's landmark decision in *NLRB* v. *Denver Building & Construction Trades Council*, 341 U. S. 675 (1951). This basic holding is that a lawful objective (i.e., work preservation) may not be attained by means of an unlawful objective (i.e., product boycott).

Joliet Contractors[10] was a pure product boycott case exactly paralleling the present case. The Glaziers' Union boycotted factory-glazed windows for the sole purpose of preserving jobsite glazing work for its members.[11] The

10. *Joliet Contractors Association* v. *NLRB*, 202 F. 2d 606 (7th Cir. 1953), cert. denied 346 U. S. 824 (1953).

11. The boycott rule was the same as Rule 17, *i.e.*, "all glazing must be done on the jobsite."

union had no dispute with the manufacturers or any concern with their working conditions or union status—i.e., no so-called "secondary" objective. Relying on the *Denver Building Trades* case, the Court pointed out that the lawful objective of *work preservation* did not justify the *proscribed boycott* of prefabricated windows manufactured by other employers.

General Millwork[12] (another "work preservation" case) also closely paralleled the present case. There the Carpenters Union boycotted prehung doors "because they wanted to keep the work that went into a prehung door for the men on the jobsite."[13] The Carpenters Union there had no dispute with the manufacturer and no concern with working conditions of other than the immediate employer. Nevertheless, the Court found violation because the union's boycott of the prefabricated doors was proscribed by the statute.

Again, in *York Corporation*[14] (another pure boycott case), the Sheet Metal Workers boycotted prefabricated metal boxes because their jobsite "agreement preserved to members of Local 98 the doing of such works" (pp. 678-79). Despite the union's objective of work preservation and the absence of any dispute with the manufacturers of the prefabricated products, the Board held this to be a clear violation of Section 8(b)(4)(A).

Again, in *MacDonald-Scott*[15] (two years after the 1959 amendments) a union boycotted offsite prefabricated products to preserve jobsite work for its members. There were no so-called "secondary" objectives. The Board held that

12. *NLRB* v. *Local 11, etc.*, 242 F. 2d 932 (6th Cir. 1957).

13. 113 NLRB 1084, 1095 (1955).

14. *Clifton Deangulo (York Corporation)*, 121 NLRB 676 (1958).

15. *Local 598 Plumbers & Steamfitters (MacDonald-Scott & Associates)*, 131 NLRB 787 (1961).

a desire for work preservation was not a defense to the product boycott, saying (p. 800):

> "In their brief, the Respondents argue that the purpose of the work stoppage was to cause MacDonald-Scott or Scott Company to perform the *alleged contract under which the Respondents claim they were promised the work of installing pipe hangers,* including the so-called pipe hangers being fabricated and installed by Eaton. *How the Respondents conceived that this could be accomplished by Scott Company without causing it to cease using or handling the product of Eaton,* a party that fits the statutory description of 'any other producer, processor, or manufacturer' is not made clear.
>
> ". . . To say that the object of the Respondents was to induce or compel Scott Company *to assign the work of installing the disputed supports to the Respondents' members in conformity to the U. A. form contract* and not to force Scott Company to cease using Eaton's product or to cease doing business with Eaton *is, on the facts here presented, to pretend that the latter object is not a necessary consequence of the former object. The two objects are inseparable. It is immaterial that one objective might be legal if the other is illegal.*" (Emphasis added.)

Again, in *Martin Company,*[16] a jobsite union boycotted prefabricated cables to preserve jobsite fabrication work. The Board, in strong terms, held this product boycott illegal despite the union's defense of work preservation and the absence of any dispute with the manufacturer. The Board stated (p. 1018):

> "It matters not that the result sought by the union might ultimately redound to the benefit of subcontractors such as Gable and increase their business by requiring Martin to give to its subconstractors the additional work of fabricating cables. *Even assuming*

16. *Local 757, Int'l Brotherhood of Electrical, etc. (The Martin Company),* 131 NLRB 1010 (1961).

that such a result would be reached, there is nothing in the Act which would permit the conclusion that an ultimate end not violative of the Act justifies a means which does violate the Act, particularly when the immediate object of the means is proscribed by the Act in precise terms.

"The Respondents contend that the record does not show that 'an object of the Union was to force Gable to cease handling the products of Martin.' *I have no hesitation in considering the cables prefabricated by Martin to be 'products of Martin,'* and, since I have found that the record discloses that the Union inspired the refusal by Gable's employees to install the prefabricated cables, it follows that the object, contrary to this contention, was to force Gable to cease handling the prefabricated cables, albeit that was not its ultimate object. *This case falls within the category of 'product boycott' cases which have been held to be violative of the Act. . . .*" (Emphasis added.)

It is abundantly clear from the statutory language, the legislative history, and the product boycott cases that Congress did not intend that an objective of work preservation should provide immunity from the express boycott proscriptions of the Act. We respectfully submit that the Court's exaltation of "work preservation" as the touchstone of boycott immunity is contrary to and in frustration of Congress' intention.

CONCLUSION.

For the reasons stated above, it is respectfully requested that a rehearing be granted, and that the decision of the Court below in No. 110 be reversed and in No. 111 affirmed.

Respectfully submitted,

CHARLES B. MAHIN,
Counsel for National Woodwork Manufacturers Association, et al.

May 9, 1967.

CERTIFICATE OF COUNSEL.

I hereby certify that this Petition for Rehearing is submitted in good faith, and not for the purpose of delay.